No. 03-1543

IN THE

Supreme Court of the United States

RICHARD R. RICHARD, JR.,

Petitioner,

v.

HOECHST CELANESE CHEMICAL GROUP, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS HOECHST CELANESE CORPORATION AND HOECHST CELANESE CHEMICAL GROUP, INC.

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QUESTIONS PRESENTED

1. Did the Fifth Circuit correctly affirm the dismissal of Petitioner's due process claim for lack of federal subject matter jurisdiction under the *Rooker/Feldman* doctrine where the proposed relief would have required a federal court to find that a final Tennessee state court judgment was entered erroneously.

2. Has Petitioner properly pled a due process claim where Petitioner has ignored the settled well-pleaded complaint rule, and asserted a potential response to an anticipatory defense as the basis for federal jurisdiction.

3. Did the Fifth Circuit correctly affirm the dismissal of Petitioner's due process claim where Petitioner alleged no joint activity between Respondents (private citizens) and any state actor.

4. Did the Fifth Circuit correctly affirm the dismissal of Petitioner's civil RICO claims, given that disgorgement is an equitable remedy available only to restrain ongoing or future violations of civil RICO, and here the alleged wrongful conduct ceased long ago.

5. Has Petitioner properly pled civil RICO claims where he was unable to allege "proximate cause" under 18 U.S.C. § 1964, given that he admits he cannot plead detrimental reliance on any alleged predicate acts of mail and wire fraud, and where his alleged injuries are indirect and subject to numerous intervening causal factors.

6. Has Petitioner properly pled civil RICO claims, given that private plaintiffs may not seek equitable relief under 18 U.S.C. § 1964.

STATEMENT PURSUANT TO RULE 29.6

Respondent CNA Holdings, Inc., formerly known as Hoechst Celanese Corporation, is an indirect, wholly-owned subsidiary of Celanese AG. Celanese AG is a publicly traded company in the process of an acquisition by Blackstone Capital Partners. Respondent Celanese Ltd., formerly known as Hoechst Celanese Chemical Group, Inc., is an indirect, wholly owned subsidiary of Celanese Holdings, Inc. Celanese Holdings, Inc. (which is a wholly owned subsidiary of CNA Holdings, Inc.) is not a publicly traded company. (Hereinafter, Hoechst Celanese Corporation and Hoechst Celanese Chemical Group, Inc. shall be referred to collectively as "Celanese.")

EXPLANATION OF RECORD CITES

"Petition" refers to the Petition for Writ of Certiorari.

"Petition App. __" refers to the Appendix attached to the Petition for Writ of Certiorari.

"Celanese App. __" refers to the Appendix attached to Celanese's Brief In Opposition.

"R. __" refers to the Record on Appeal filed with the United States Court of Appeals for the Fifth Circuit.

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COUNTERSTATEMENT OF THE CASE

By this case, Petitioner seeks to ignore the settled *Rooker/Feldman* doctrine, claiming instead that a federal court may review a Tennessee state court's final judgment approving a nationwide polybutylene (*i.e.*, plastic) plumbing class action settlement agreed to by Celanese, Respondent Shell Oil Company ("Shell") and the plaintiff class in *Cox v. Shell Oil Co.*, No. 18,844 (Chancery Court, Obion County, Tenn. Nov. 17, 1995) ("*Cox*"). Petitioner also seeks to federalize state products liability law under the guise of civil RICO, claiming that end users of products who never heard or detrimentally relied upon any alleged misrepresentations by defendants — remote, raw material suppliers — may nevertheless bring federal racketeering claims against and seek disgorgement from these suppliers. As shown below, the lower courts held that Petitioner's claims were barred under well-settled authority. *Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345 (5th Cir. 2003) (Petition App. at 1-20); *Richard v. Hoechst Celanese Chem. Group, Inc.*, 208 F.R.D. 575 (E.D. Tex. 2002) (Petition App. at 21-53). These rulings are fully consistent with prior decisions of this Court and every United States court of appeal to have recently addressed the same matters, and Petitioner offers nothing to justify further review of these rulings.

The Fifth Circuit's Ruling On Petitioner's Due Process Claim

First, the Fifth Circuit ruled that the relief requested by Petitioner — an injunction barring Celanese and Shell from ever asserting the preclusive effect of the *Cox* final judgment — would have required a federal court to review and find erroneous the *Cox* final state court judgment in direct contravention of the settled *Rooker/Feldman* doctrine. This ruling, which affirmed the decision of the United States District Court for the Eastern District of Texas (the "District Court"), is entirely consistent with prior decisions of this Court and every United States court of appeal to have recently addressed the same matter.

Second, the Fifth Circuit ruled that even if Petitioner's due process claim was not barred by the *Rooker/Feldman* doctrine, Petitioner failed to state a violation because Petitioner alleged no joint activity between Respondents (private citizens) and any state actor. Under settled authority of this Court, a due process claim requires action under "color of state law." Here, Petitioner's failure to allege any joint activity with a state actor is unsurprising, given that, among other things, he admits the *Cox* court — the only conceivable state actor here — was an "innocent" actor which had no knowledge of any alleged wrongful conduct. This ruling too is fully consistent with prior rulings of this Court and every other circuit court to have addressed the issue.

Third, Petitioner's due process claim violates the well-pleaded complaint rule. As this Court has long held, federal subject matter jurisdiction is based only upon the allegations of the plaintiff's well-pleaded complaint. However, Petitioner's due process claim is nothing more than an anticipated response to a potential affirmative defense, and thus does not provide a basis for federal subject matter jurisdiction. Here, Petitioner's due process claim is based solely upon his contention that his due process rights were somehow violated when the Tennessee state court approved the *Cox* settlement in 1995. While Petitioner's allegations are patently false, they would arise only in the event Celanese or Shell asserted the preclusive effect of the *Cox* final judgment as a bar to his claims, and Petitioner admits that has not been done.

The Fifth Circuit's Ruling On Petitioner's Civil RICO Claims

First, the Fifth Circuit properly affirmed the District Court's ruling that Petitioner failed to properly plead civil RICO claims because disgorgement is an equitable remedy available only to restrain ongoing or future violations of civil RICO, and Petitioner here admits the alleged wrongful conduct ceased many years ago. The Fifth Circuit's decision applied the plain and unambiguous language of 18 U.S.C. § 1964(a), and is consistent

with the only other United States court of appeal to have addressed the issue.

Second, Petitioner lacks standing to plead civil RICO claims under established authority of this Court because he cannot allege "proximate cause" under § 1964. Petitioner fails the proximate cause requirement because he admits he cannot plead detrimental reliance on any alleged predicate acts of mail and wire fraud, and because his alleged injuries are indirect and subject to numerous intervening causal factors. For this very reason, the Fifth Circuit, following decisions of this Court, recently affirmed the dismissal of nearly identical RICO claims against Celanese and the other Respondents brought by a similarly situated plaintiff, based on similar allegations, and this Court denied the petition for writ of certiorari. *See Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001) ("*Summit*").

Third, nearly every United States court of appeal to have commented on the issue has rejected or expressed considerable doubt that injunctive relief is available to private plaintiffs, such as Petitioner here, under civil RICO. *See, e.g.*, *Religious Tech. Center v. Wollersheim*, 796 F.2d 1076, 1088 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) ("Taken together, the legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO").

I. Proceedings In The District Court

Petitioner seeks to recover damages allegedly arising from polybutylene plumbing installed in his mobile home. (R. 481-82, 486-87, 492-97.) This action was not brought against any of the various companies that designed, manufactured, sold or installed the different types of polybutylene plumbing and their components. Rather, Petitioner has only sued some of the raw material suppliers, such as Celanese, Shell and Respondent E.I. duPont de Nemours & Company, which provided the resins

used by certain companies in the manufacture of certain plumbing components in some types of polybutylene plumbing.[1] (R. 483-84.) Petitioner admits that polybutylene plumbing has not been sold for many years (R. 484), and it is undisputed that Celanese ceased supplying its raw material Celcon for use in this type of plumbing more than a decade ago.

A. Facts Concerning Petitioner's Due Process Claim

In 1995, Hoechst Celanese Corporation and Shell agreed without admitting liability to the *Cox* nationwide class action settlement. Under the *Cox* settlement, these companies, among other things, agreed to commit a minimum of $950 million to provide new plumbing systems and property damage compensation to class members with qualifying leaks. (Celanese App. at 11a, 17a-18a.) That settlement received final approval from the Tennessee state court in November 1995, and all appeals from that final judgment were dismissed in 1996. The final judgment approving the *Cox* settlement bars property owners, like Petitioner here, who have not opted out of the class from pursuing a lawsuit relating to polybutylene plumbing against Celanese or Shell. (*Id.* at 24a.)

The final judgment approving the *Cox* settlement was the end result of intense litigation and arms-length negotiations over a long period of time among all of the various interested parties. (*Id.* at 14a.) In approving the *Cox* settlement, the Tennessee state court held multiple hearings where all interested parties were given the opportunity to be heard and where evidence and briefing both in support of and in opposition to the settlement were submitted on all relevant issues. (*Id.* at 8a, 10a.) After

1. Hoechst Celanese Corporation is a raw material supplier of a variety of materials and plastics, including a plastic resin called Celcon, which was used by third-parties in the manufacture of some parts found in some types of polybutylene plumbing. Hoechst Celanese Chemical Group, Inc. is a commodity or bulk chemical supplier; it did not manufacture or otherwise supply Celcon, and thus it has no connection whatsoever to polybutylene plumbing. (*See* R. 484, 656.)

hearing argument and considering the evidence, the *Cox* court made 73 separate findings of fact and conclusions of law, and ruled that the settlement was "in all respects fair, reasonable, and adequate and in the best interests of the Settlement Class." (*Id.* at 25a.)

Moreover, the *Cox* court found that class counsel "maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case," and rejected various allegations of collusion amongst counsel and the parties. (*Id.* at 30a.) The court also ruled that the class representatives were adequate, as it found no conflicts of interest between the representatives and the absent class members. (*Id.*) In addition, after reviewing the details of the multi-media notice campaign, considering various objections and hearing the testimony of class notice experts, the *Cox* court found that the $10 million *Cox* "notice program is one of the most comprehensive class notice campaigns ever undertaken," that "all reasonable efforts have been made to reach affected consumers," and that "the best notice practicable under the circumstances has been provided to the Settlement Class." (*Id.* at 12a, 24a.) Consequently, the Tennessee court ruled that the *Cox* notice program "met and exceeded" all constitutional requirements. (*Id.* at 24a.)

Despite these facts, Petitioner alleges that his due process rights were somehow violated by the Tennessee state court when it approved the *Cox* settlement. Petitioner claims that in the event Celanese and Shell assert the preclusive effect of the *Cox* final judgment as a bar to his claims, which he admits they have yet to do, he will respond by raising such alleged due process deficiencies. (R. 510-11.) As relief, Petitioner seeks to "preliminarily and permanently enjoin[] [Celanese and Shell] from directly or indirectly invoking [the *Cox* judgment] . . . to bar the Plaintiff and other members of the Class from asserting their rights to recover damages caused by the polybutylene system." (R. 515.)

B. Facts Concerning Petitioner's Civil RICO Claim

In an effort to support a federal civil RICO claim, Petitioner alleges that Celanese and the other Respondents formed an association-in-fact enterprise which Petitioner refers to as the "PB Enterprise." (R. 684-85.) Petitioner claims that the PB Enterprise, among other things, used the mail and wires to make unspecified misrepresentations not to him, but rather to unidentified building code bodies, municipal agencies, developers, builders, and plumbers regarding polybutylene plumbing. (R. 495-96, 498-502, 656-59, 666-67.)

Significantly, Petitioner admits that neither Celanese nor any other Respondent made any representation to Petitioner or any other homeowner regarding polybutylene plumbing or components thereof. To the contrary, Petitioner admits that the only alleged representation he received regarding polybutylene plumbing was supposedly made by the prior owner of his mobile home. (R. 664-65.) According to Petitioner, the prior owner of his mobile home told him that it was plumbed with polybutylene, that polybutylene was an excellent and durable product, and "[i]n reliance on this false representation," Petitioner purchased the home. (R. 665.)

C. Procedural History

Petitioner has made multiple attempts over the past several years to manufacture federal jurisdiction in this case, both by amending his complaint and by attempting to re-characterize his allegations in briefing and at oral argument. As shown below, none of these efforts were sufficient to save Petitioner's claims as a matter of law.

Petitioner's Original Complaint sought monetary damages for allegedly leaking polybutylene plumbing and asserted only common law tort claims. (R. 1-25.) Each Respondent filed a motion to dismiss for lack of federal subject matter jurisdiction. (R. 54-63, 64-84, 85-108.) Petitioner did not respond to those

motions, but instead filed a First Amended Complaint. (R. 179-216.) In an attempt to manufacture federal jurisdiction, the First Amended Complaint asserted claims for civil RICO under 18 U.S.C. §§ 1961, *et seq.*, the Due Process Clause of the Fourteenth Amendment, the Lanham Act under 15 U.S.C. § 1125(a), and common law tort. (R. 195-215.) Respondents moved to dismiss the First Amended Complaint for lack of federal subject matter jurisdiction, failure to state a claim upon which relief could be granted, and failure to plead fraud with adequate particularity. (R. 222-60, 261-97, 298-310.) In response, Petitioner once again amended his complaint. (R. 481-521.) The Second Amended Complaint also asserted claims for civil RICO, alleged violation of the Due Process Clause, alleged violation of the Lanham Act,[2] and common law tort, but did not plead a civil rights claim under 42 U.S.C. § 1983. (R. 498-520; *see also* R. 1007.) Thereafter, Respondents moved to dismiss the Second Amended Complaint. (R. 531-33, 534-36, 537-76.)

Prior to the hearing on Respondents' motions to dismiss, the District Court ordered Petitioner to file a civil RICO case statement to assist the court in determining "whether Plaintiff[] [has] asserted claims under RICO that possess the required level of particularity." (R. 650-51.) Thereafter, Petitioner filed a civil RICO case statement (R. 652-714), and Respondents renewed their motions to dismiss (R. 715-39, 743-46, 748-87). In his civil RICO statement, Petitioner admitted, among other things, that he had not received any representations from any Respondent regarding polybutylene plumbing or otherwise. (R. 664-65.) Apparently recognizing that the Fifth Circuit's decision in *Summit* (*see infra*) foreclosed him from obtaining monetary damages under RICO, Petitioner raised for the first

2. Recognizing the futility of his Lanham Act claim, Petitioner withdrew it (R. 928). *See Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1383 (5th Cir. 1996) (ruling that consumers lack standing to prosecute a claim for false advertising or promotion under § 43(a) of the Lanham Act).

time at oral argument in October 2001 that he sought injunctive relief under civil RICO.[3] (Petition App. at 49.)

Subsequently, the District Court dismissed Petitioner's civil RICO claims against all Respondents on the grounds that, among other things, Petitioner had not pled proximate cause. (Petition App. at 42-48.) As the District Court ruled, Petitioner's civil RICO claims fail to plead proximate cause because, among other things, Petitioner "has not shown that there was any misrepresentation, or reliance thereon, made to [Petitioner] *directly*." (*Id.* at 45 (emphasis in original).) The District Court also dismissed Petitioner's due process claim for lack of federal subject matter jurisdiction because "the relief requested by [Petitioner] requests the Court to review the final order and judgment approving the Tennessee nationwide class action settlement" in contravention of the *Rooker/Feldman* doctrine.[4] (*Id.* at 34-35.)

II. The Fifth Circuit's Decision

Consistent with established jurisprudence of this Court, the Fifth Circuit affirmed the District Court's order, holding:

- That Petitioner's due process claim violated the *Rooker/Feldman* doctrine. (Petition App. at 7-11.) In so ruling,

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3. Petitioner also argued in the District Court that under the so-called target exception, he could prosecute a civil RICO claim against Respondents even though he did not rely directly on any representation made by any Respondent. (Petition App. at 46-48.) However, Petitioner appears to have recognized that this argument too is foreclosed as he did not raise this argument on appeal. *See Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 223 (5th Cir.), *cert. denied*, 124 S. Ct. 101 (2003) (holding that the target exception is applicable only where, unlike here, the plaintiff "can demonstrate injury as a direct and contemporaneous result of fraud committed against a third party").

4. Subsequently, the District Court entered an order dismissing Petitioner's state law claims without prejudice. (R. 1312.)

the court rejected Petitioner's argument that there is a procedural due process exception to the *Rooker/Feldman* doctrine, explaining that: "A federal court cannot examine the due process deficiencies in *Cox* without disturbing the underlying judgment." (*Id.* at 11.) The court also found that if federal subject matter jurisdiction had existed, Petitioner's due process claim failed to state the requisite joint activity between Respondents and any state actor. (*Id.* at 11-15.)

That Petitioner's civil RICO claims failed to state a claim, explaining that "Section 1964(a) establishes that equitable remedies are available only to prevent ongoing and future conduct." (*Id.* at 17.) In so holding, the court found that Petitioner could not allege that disgorgement would "prevent and restrain" any ongoing or future conduct by Respondents, as Petitioner conceded that Respondents ceased any involvement with polybutylene plumbing long ago. (*Id.*)

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT HELD CORRECTLY THAT THE *ROOKER/FELDMAN* DOCTRINE BARRED PETITIONER'S ALLEGED DUE PROCESS CLAIM

Petitioner claims that the Fifth Circuit should have required the District Court to review the *Cox* court's procedural due process findings set forth in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) — adequate notice, an opportunity to be heard and participate, the right to opt out, and adequate representation — before ruling that his claim was barred for lack of federal subject matter jurisdiction under the *Rooker/Feldman* doctrine. (Petition at 4, 10-13.) In making this argument, Petitioner turns the *Rooker/Feldman* doctrine on its head. Under this doctrine, federal courts lack jurisdiction to review final state court judgments even if (unlike here) the state

court judgment was incorrect on constitutional issues. As shown below, the Fifth Circuit's decision affirming on *Rooker/Feldman* grounds is consistent with and required by prior decisions of this Court.

A. The Fifth Circuit Held Correctly That Petitioner's Alleged Due Process Claim Is "Inextricably Intertwined" With The *Cox* Final Judgment

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), this Court held that federal district courts "do not have [subject matter] jurisdiction . . . over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *Feldman,* 460 U.S. at 486; *see also Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 296 (1970) ("lower federal courts possess no power whatever to sit in direct review of state court decisions"). Federal district courts lack subject matter jurisdiction once a state court has finally adjudicated an issue because Congress has conferred only original, not appellate, jurisdiction on the district courts. *Rooker*, 263 U.S. at 416. For this reason, where, as here, a litigant alleges that a state court judgment was entered in error, that litigant's proper avenue for potential relief is an appeal within the court system of that state, not the commencement of a federal action. *Feldman*, 460 U.S. at 482; *see also Atlantic Coast Line*, 398 U.S. at 296 (party may only "seek vindication of its federal right in the [state] appellate courts").

The Court has also made clear that "[i]f the constitutional claims presented to a United States district court are inextricably intertwined" with the merits of a judgment rendered by a state court, "then the district court is in essence being called upon to review the state-court decision. This the district court may not

do." *Feldman*, 460 U.S. at 483 n.16. In an often cited concurring opinion, Justice Marshall has explained that:

> it is apparent . . . that the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring). Thus, if a federal court can provide relief only by determining that the state court judgment was erroneous, then the claim is barred by the *Rooker/Feldman* doctrine.

Following this settled authority, the Fifth Circuit recognized that where a claim is inextricably intertwined with the merits of a final state court judgment, that claim is barred under the *Rooker/Feldman* doctrine. Applying this settled rule to Petitioner's alleged due process claim, the Fifth Circuit held that Petitioner's "allegations indisputably denounce the express [procedural due process] findings of the *Cox* state court." (Petition App. at 10.) The Fifth Circuit found further that the "*Cox* court's [procedural due process] findings that allow for certification are 'inextricably intertwined' with Richard's constitutional challenge to the state's compliance with due process requirements." (*Id.* at 11.) Having reached this conclusion, the Fifth Circuit held that "[a] federal court cannot examine the due process deficiencies in *Cox* without disturbing the underlying judgment," and thus Petitioner's claim was barred by the *Rooker/Feldman* doctrine. (*Id.*) As such, the Fifth Circuit's decision is fully consistent with prior holdings of this Court.

B. The Fifth Circuit's Decision Does Not Conflict With Any Decision Of This Court Or Any Other United States Court Of Appeal

Notwithstanding this settled law, Petitioner claims that the Fifth Circuit's decision is in conflict with decisions of other United States courts of appeal because the Fifth Circuit did not review the *Cox* court's procedural due process findings before ruling that his claim was barred under the *Rooker/Feldman* doctrine. (Petition at 11-15.) Petitioner's argument demonstrates a fundamental misunderstanding of the doctrine. The doctrine is jurisdictional in nature, and bars federal courts from sitting in review of final state court judgments. *Feldman*, 460 U.S. at 486.[5] For this reason, among others, every United States court of appeal to have recently addressed the issue has held uniformly that the *Rooker/Feldman* doctrine bars any federal suit which would effectively nullify or overrule a state court judgment, even as to procedural due process issues.

1. The Fifth Circuit's Decision Does Not Conflict With Any Decision Of Any Court Of Appeal In The Context Of A Class Action.

The Fifth Circuit's decision is entirely consistent with every court of appeal which has addressed the *Rooker/Feldman* doctrine in the context of a class action — decisions which Petitioner inexplicably has not cited, much less attempted to distinguish — as those courts held uniformly that federal district courts lack subject matter jurisdiction if a federal court can provide relief only upon a finding that a state court had erred, including as to *Shutts* due process factors. Similarly, and despite Petitioner's argument to the contrary (Petition at 16-17), those

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5. *See also* Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 Notre Dame L. Rev. 1085, 1101 (1999) ("the *Rooker-Feldman* doctrine is first and foremost an integral part of judicial federalism. Res judicata is about parties; *Rooker-Feldman* is about courts. That difference explains why *Rooker-Feldman* . . . is a jurisdictional doctrine rather than an affirmative defense").

courts of appeal have held uniformly that absent class members, such as Petitioner here, are "parties" to the prior proceeding under the *Rooker/Feldman* doctrine.[6]

For example, in *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997), the Seventh Circuit ruled that absent class members were barred under the *Rooker/Feldman* doctrine from commencing an action in federal district court seeking, among other things, to review a class action settlement which had been approved by an Alabama state court. There, like here, absent class members argued that the federal district court was authorized to review the state court judgment because the state court allegedly had failed to comply with procedural due process. *Id.* at 509-10. Finding that the plaintiffs' "claim in federal court [was] a multi-pronged attack on the approval of the settlement regarding the attorney fees issue," the Seventh Circuit held that the federal action "would run directly into the state court finding, entered after a two-day fairness hearing — that the fees were reasonable. The federal claims are 'inextricably intertwined' with the state court judgment, whether that judgment is right or wrong." *Id.* at 511. As such, the court ruled that the *Rooker/Feldman* doctrine barred the federal district court from adjudicating the plaintiffs' claims. *Id.* at 511-12.

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6. Consequently, Petitioner's citation to *Johnson v. DeGrandy*, 512 U.S. 997 (1994), *Allen v. Allen*, 48 F.3d 259 (7th Cir. 1995) and *Simes v. Huckabee*, 354 F.3d 823 (8th Cir. 2004), is unavailing. None of those cases concerned absent class members seeking relief from a final state court judgment in federal court. To the contrary, those cases stand for the uncontroversial proposition that *Rooker/Feldman* is inapplicable where, unlike here, the party was not represented in the prior state court proceeding or lacked the opportunity to raise their federal claims in the state court proceeding. Of course, Petitioner's argument also runs counter to the representational nature of a class action. *See Shutts*, 472 U.S. at 808 (explaining that "a 'class' or 'representative' suit was an exception to the rule that one could not be bound by judgment *in personam* unless one was made fully a party in the traditional sense") (citing *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940)).

Likewise, in *Snider v. City of Excelsior Springs, Missouri*, 154 F.3d 809 (8th Cir. 1998), the Eighth Circuit ruled that a "state claim is inextricably intertwined if the federal challenge succeeds only to the extent that the state court wrongly decided the issues before it." *Id.* at 811. There, like here, absent class members claimed that they were not bound by the prior state court judgment, alleging that because "notice was not sent to the class members," they were denied their "procedural due process rights." *Id.* at 812. In rejecting the plaintiffs' claim, the court held that:

> To determine that the plaintiffs here were not "parties" in the state court action would require us to hold that the state court wrongly certified the class and wrongly ordered a final judgment in the condemnation proceeding. As we have held before in a case in which the plaintiffs alleged insufficient notice in a state court action, there is no procedural due process exception to the *Rooker-Feldman* rule.

Id.

Finally, in *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133 (3d Cir. 1998), the Third Circuit affirmed the district court's ruling that it lacked subject matter jurisdiction to hear the plaintiffs' challenge to the fairness of a class action settlement approved by a Louisiana state court. In so ruling, the court found that "in order for us to grant [the plaintiffs'] requested relief, we would first have to 'determine that the state court judgment was erroneously entered.'" *Id.* at 143 (citation omitted). Consistent with settled law, the Third Circuit held that "*Rooker-Feldman* bars exactly this sort of intermediate appellate review of state court judgments. . . ." *Id.*

2. The Fifth Circuit's Decision Does Not Conflict With Any Decision Of Any Court Of Appeal Outside The Context Of A Class Action.

From Celanese's review, it appears that every United States court of appeal to have recently addressed the issue outside the context of a class action has confirmed the settled rule that the *Rooker/Feldman* doctrine bars any federal suit which would effectively nullify or modify a state court judgment or any federal suit in which the federal court could provide relief only by determining that the state court judgment was erroneous. *See, e.g.*, *Rosenfeld v. Egy*, 346 F.3d 11, 19 (1st Cir. 2003) (holding that the federal claim was "inextricably intertwined" with the state court proceeding because the "alleged constitutional injury . . . could only exist to the extent that the [state] court wrongly decided to issue . . . the restraining order"); *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003) ("*Rooker-Feldman* bars subject matter jurisdiction in federal district court" where the plaintiff alleges the state court judgment was erroneous);[7] *Kropelnicki v. Siegel*, 290 F.3d 118, 129 (2d Cir. 2002) ("if adjudication of a claim in federal court would require the court to determine that a state court judgment was erroneously entered or was void, the claim is inextricably intertwined with the merits of the state court judgment");

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7. Contrary to Petitioner's assertion (Petition at 13-14), the Ninth Circuit's holdings in *Noel* and *Kougasian v. TMSL, Inc.*, 359 F.3d 1136 (9th Cir. 2004) are fully consistent with the Fifth Circuit's decision. In those cases, the Ninth Circuit held that *Rooker/Feldman* bars federal subject matter jurisdiction where, as here, a "federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision." *Noel*, 341 F.3d at 1164; *Kougasian*, 359 F.3d at 1140 (same). That is precisely what Petitioner asserts and seeks here: namely, that his due process rights were violated because the Tennessee state court somehow did not comply with *Shutts* in approving the *Cox* settlement, and that an injunction should issue barring Celanese and Shell from asserting the preclusive effect of the *Cox* final judgment as a bar to his claims. (R. 510-11.)

Tropf v. Fidelity Nat'l Title Ins. Co., 289 F.3d 929, 937 (6th Cir. 2002), *cert. denied*, 537 U.S. 1118 (2003) (*Rooker/Feldman* doctrine bars a federal suit "[w]here federal relief can only be predicated upon a conviction that the state court was wrong"); *Goodman v. Sipos*, 259 F.3d 1327, 1332 (11th Cir. 2001) ("A federal claim is inextricably intertwined with a state court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it") (citation omitted); *Allstate Ins. Co. v. The West Virginia State Bar*, 233 F.3d 813, 819 (4th Cir. 2000) (same); *Anderson v. Colorado*, 793 F.2d 262, 264 (10th Cir. 1986) ("this lawsuit essentially seeks to undo the . . . decision of the Colorado state court. Therefore, it fits squarely within the . . . doctrine prohibiting federal district courts from reviewing state-court judgments").

C. Petitioner's Due Process Claim Fails Under The Well-Pleaded Complaint Rule

Petitioner's due process claim also fails under the settled well-pleaded complaint rule. This Court has held that federal subject matter jurisdiction is based only upon the allegations of the plaintiff's well-pleaded complaint. *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) ("the question whether a claim 'arises under' federal law must be determined by reference to the 'well-pleaded complaint'"); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908) (same). As such, this Court has explained that "[t]he federal questions 'must be disclosed upon the face of the complaint, unaided by the answer,'" and "'the complaint itself will not avail as a basis of jurisdiction in so far as it . . . anticipates or replies to a probable defense.'" *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127-28 (1974) (citation omitted).

Accordingly, federal question jurisdiction is not created where a party asserts an anticipatory defense as the jurisdictional basis, much less where, as here, a party asserts a potential response to an anticipatory defense as a basis for federal subject matter jurisdiction. *Id.*; *see also Merrell Dow*, 478 U.S. at 808

("A defense that raises a federal question is inadequate to confer federal jurisdiction"); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 (1983) (same).

Here, Petitioner's due process claim violates the well-pleaded complaint rule because Petitioner does not assert a separate, cognizable federal due process or civil rights claim, but rather has merely asserted a potential response to an anticipatory defense which Respondents may raise. Specifically, assuming *arguendo* (and contrary to fact and law) that, as Petitioner alleges, his due process rights were somehow violated in the Tennessee state court action, the issue would arise only in the event Celanese and Shell assert the preclusive effect of the *Cox* final judgment as a bar to Petitioner's claims. As Petitioner admits, Celanese and Shell have not raised this potential defense. Thus, Petitioner's due process claim fails under the well-pleaded complaint rule, and does not present a justiciable case or controversy.[8]

II. THE FIFTH CIRCUIT HELD CORRECTLY THAT PETITIONER'S DUE PROCESS CLAIM FAILED FOR THE ADDITIONAL REASON THAT PETITIONER DID NOT ALLEGE THE REQUISITE STATE ACTION

To state a claim under the Due Process Clause of the United States Constitution or 42 U.S.C. § 1983, a plaintiff must allege "the violation of a right secured by the Constitution and laws of the United States, and . . . that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). *See also Flagg Bros. v. Brooks*, 436 U.S. 149, 155 (1978) (same). Here, Respondents are private citizens, not acting under color of state law and thus cannot face § 1983 claims, as the Fifth Circuit correctly

8. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (ruling that an Article III court only has jurisdiction to resolve "a real and substantial controversy . . . as distinguished from an opinion advising what the law would be upon a hypothetical state of facts") (citations omitted).

ruled citing well-settled authority of this Court. (Petition App. at 13-15.)

This Court explained this settled rule recently in *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) where it held, "[l]ike the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.'" *Id.* at 50 (citation omitted). For this reason, where the defendant is a private citizen, the state action or under color of state law element is only satisfied in the highly unusual circumstance where, unlike here, the plaintiff alleges that the state has "so far insinuated itself into a position of interdependence with the [private actor] that it was a joint participant in the enterprise." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357-58 (1974). *See also Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 942 (1982) (holding that private parties are only acting "under color" of law where they have "'jointly engaged with state officials in the prohibited action'") (citation omitted); *Dennis v. Sparks*, 449 U.S. 24, 27 (1980) (holding that under color of state law met only where a private citizen is a "willful participant in joint action with the State or its agents").

Despite this settled authority, Petitioner argues that "[a]pproval of a settlement by a state court constitutes 'state action.'"[9] (Petition at 18-19.) While unclear, it appears Petitioner

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9. Petitioner's citation to the subsequently withdrawn *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997) (Petition at 19) is misplaced. The only issue before the Ninth Circuit was whether a securities fraud class action settlement approved by a Delaware state court was entitled to full faith and credit, and had nothing to do with pleading state action to support a due process or civil rights claim. *Id.* at 1238. Moreover, the Ninth Circuit subsequently withdrew that opinion and issued a new opinion on remand that extended full faith and credit to the Delaware state court judgment. *See Epstein v. MCA, Inc.*, 179 F.3d 641, 644 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999). Similarly (Cont'd)

claims that joint participation between Respondents and a state actor arose because Respondents sought approval by the Tennessee court of the *Cox* settlement, even though Petitioner admits that the *Cox* court was an "innocent" actor which had no knowledge of any alleged wrongful conduct.[10] (*Id.* at 7, 18-19; R. 1014-15.) Petitioner has misstated not only the facts, but the law.

The Court's decision in *Dennis v. Sparks*, 449 U.S. 24 (1980), an action involving allegations of bribery of a state court judge, sets forth the governing standard for a claim such as the one Petitioner attempts here. In *Dennis*, the Court made clear that merely alleging private citizens were involved in a lawsuit, such as Petitioner alleges here, does not make them joint actors with the court, and thus does not involve state action. *See id.* at 28 ("Of course, merely resorting to the courts and being on

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unavailing is Petitioner's citation to *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (Petition at 19-20), as the case involved a direct appeal of an asbestos personal injury/wrongful death class action settlement approved by a federal court, and also had nothing to do with pleading state action to support a due process or civil rights claim.

10. That Petitioner now claims his complaint alleges facts sufficient to show "judicial or other malfeasance" (Petition at 19), is belied by the pleadings in this case. Neither Petitioner's complaint (which has been amended on two occasions) nor any other papers filed in this case contain a single allegation of any malfeasance on the part of the *Cox* court, much less collusion or other joint activity between the *Cox* court and any Respondent. (R. 1-25, 46-53, 195-215, 311-46, 498-520, 577-93, 973-1101.) Moreover, amending the complaint at this late date to add such conclusory and false allegations is pointless, as it is well settled that "a bare allegation of . . . joint action [with a state official] will not overcome a motion to dismiss" a due process or § 1983 claim. *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000). *See also Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5th Cir.1982) (affirming dismissal of § 1983 claim alleging conspiracy between attorney and state court judge where, among other things, "[t]he conspiracy allegations made by [the plaintiff were] conclusory").

the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge"). Rather, the Court held that private citizens must be "jointly engaged with state officials in the challenged action" in order to satisfy the state action element of a due process or civil rights claim. *Id.* at 27-28. *See also American Mfrs. Mut. Ins. Co.*, 526 U.S. at 54 ("a private party's mere use of the State's dispute resolution machinery, without the 'overt, significant assistance of state officials'" is not state action) (citations omitted); *Lugar*, 457 U.S. at 939, n.21 ("we do not hold today that 'a private party's mere invocation of state legal procedures constitutes 'joint participation' or 'conspiracy' with state officials satisfying the § 1983 requirement of action under color of law'").[11] Petitioner does not, nor could he, allege such joint action.

Applying this settled law, the Fifth Circuit ruled that even if a federal court had jurisdiction over Petitioner's due process claim, Petitioner had failed to allege the requisite state action. (Petition App. at 11-15.) In so ruling, the Fifth Circuit found that:

> Richard does not contend that the judge knowingly participated in the alleged conspiracy. Richard only

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11. In an attempt to save his claim, Petitioner argues that state action can be alleged under the so-called "innocent agent doctrine." (Petition at 7, 18.) However, the authority cited by Petitioner for this proposition concerns criminal conduct under 18 U.S.C. § 2(b), which contains no "color of state law" requirement. Rather, § 2(b) provides that a defendant may be criminally responsible as a principal if he "willfully caused an act to be done which if directly performed by him or another would be an offense against the United States." As such, those cases are beside the point. *See United States v. Rashwan*, 328 F.3d 160, 165 (4th Cir.), *cert. denied*, 124 S. Ct. 320 (2003) (conviction for identification fraud); *United States v. Gabriel*, 125 F.3d 89, 99 (2d Cir. 1997) (conviction for false statements); *United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992) (conviction for assault); *United States v. Smith*, 584 F.2d 731, 734 (5th Cir. 1978) (conviction of firearm dealer); *United States v. Lester*, 363 F.2d 68 (6th Cir. 1966) (criminal conspiracy).

> alleges that [Respondents] conspired with opposing counsel *before* a judge. . . . Richard fails to allege that the state judge was in any way involved in the misconduct. Indeed, Richard characterizes the state judge as "an innocent agent."

(*Id.* at 15 (emphasis in original).) As such, the court ruled that Petitioner had failed to allege joint action between Respondents and a state actor, and thus could not state a due process violation. (*Id.*) Accordingly, the Fifth Circuit's decision is fully consistent with prior holdings of this Court.

The Fifth Circuit's decision is also fully consistent with decisions of every other circuit court to have recently addressed the issue: absent an agreement between a private party and a state actor to violate the plaintiff's constitutional rights (which is not alleged here), "mere recourse to state or local court legal procedures does not . . . constitute 'joint activity' with the state sufficient to subject a private party to liability under section 1983." *Hoai v. Vo*, 935 F.2d 308, 312-13 (D.C. Cir. 1991) (finding no joint activity where the plaintiff claimed that the private party "lied to the court and advanced an 'erroneous and illegal theory of law' in order to obtain the . . . TRO," but admitted that the state court was "an 'unwitting' party to the actions complained of").[12] Thus, the Fifth Circuit's decision is

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12. *See also Tahfs v. Proctor*, 316 F.3d 584, 592-93 (6th Cir. 2003) (holding no state action where there were only "conclusory allegations" that prior state court rulings obtained against the plaintiff were the result of corruption between private parties and state court actors); *Gonzalez-Morales v. Hernandez-Arencibia*, 221 F.3d 45, 49, 51 (1st Cir. 2000) (finding no state action in court's order of attachment, as "something more than mere resort to a state court is required"); *Gale v. Perovic*, 1997 U.S. App. LEXIS 15530, *3 (7th Cir. June 13, 1997) (no state action where private party allegedly had conspired with state court judges to render judgments adverse to plaintiff, as the complaint was "devoid of any hint — that defendants entered into any agreement with any state

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entirely consistent with every court of appeal to have addressed this issue.

III. THE FIFTH CIRCUIT HELD CORRECTLY THAT PETITIONER'S CIVIL RICO CLAIMS FAILED TO STATE A CLAIM

Petitioner argues that the Fifth Circuit should have permitted him to add a claim for equitable relief under civil RICO in the form of disgorgement of Respondents' past profits. (Petition at 21-22.) The Fifth Circuit rejected this claim because disgorgement is available to private litigants, if at all, only to prevent future conduct. Here, it is admitted by Petitioner that Respondents' allegedly wrongful conduct stopped nearly a decade ago. The Fifth Circuit's decision affirming the dismissal of Petitioner's unpled "claim" for disgorgement not only

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judges for the express purpose of depriving [the plaintiff] of his constitutional rights"); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1265-66 (3d Cir. 1994) (ruling no state action in entry of judgment where there was no agreement between the private party and the state court); *Mershon v. Beasley*, 994 F.2d 449, 451-52 (8th Cir. 1993) (holding no state action where the requisite "mutual understanding, or a meeting of the minds" between the private party and the state prosecutor was "'mere conjecture and speculation'"); *Schucker v. Rockwood*, 846 F.2d 1202, 1205 (9th Cir. 1988) ("Invoking state legal procedures does not constitute 'joint participation' or 'conspiracy' with state officials sufficient to satisfy section 1983's state action requirement"); *Dahlberg v. Becker*, 748 F.2d 85, 87-88, 93 (2d Cir. 1984) (ruling that "the mere invocation by defendants of New York's legal procedures does not constitute joint participation so as to satisfy the statutory requirement under § 1983 that there be a state actor"; no state action where "a judge . . . unknowingly signs a defective order that has been prepared and submitted to him by an attorney"); *Cobb v. Georgia Power Co.*, 757 F.2d 1248, 1251 (11th Cir. 1985) (finding that "one who has obtained a state court order or judgment is not engaged in state action merely because it used the state court legal process"); *Torres v. First State Bank of Sierra County*, 588 F.2d 1322, 1326 (10th Cir. 1978) (same).

followed settled RICO jurisprudence, but is fully consistent with the only other court of appeal to have ruled on the same matter.

Moreover, granting certiorari on the issue of disgorgement would be futile, as the Fifth Circuit was presented with numerous independent grounds upon which to affirm the dismissal of Petitioner's civil RICO claims, including, among other things, Petitioner's admission that he cannot plead proximate causation as required by this Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and that private plaintiffs cannot seek equitable relief under civil RICO. Thus, further review of this matter is not justified.

A. The Fifth Circuit's Decision Followed Settled Law, And Is Fully Consistent With The Only Other Court Of Appeal To Have Ruled On The Issue

The Fifth Circuit's decision is in complete accord with the Second Circuit's holding in *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995), *cert. denied*, 516 U.S. 1122 (1996), the only other circuit court to have addressed the issue. In *Carson*, the Second Circuit held that 18 U.S.C. § 1964(a) authorizes a party to seek disgorgement as a remedy for a civil RICO violation only where, unlike here, the disgorgement was "designed to 'prevent and restrain' future conduct rather than to punish past conduct." *Id.* at 1182. There, the federal government sought to obtain disgorgement of allegedly ill-gotten gains earned by a defendant who was no longer involved with the racketeering activities. *Id.* at 1180-82. In considering the issue, the court examined the text and purpose of the civil RICO statute, and observed that § 1964(a) is "forward looking, and calculated to prevent RICO violations in the future." *Id.* at 1181. For this reason, the court explained that § 1964(a) confers upon the district courts the power solely to "prevent and restrain" RICO violations, and provides no additional sources of jurisdiction. *Id.* at 1181. *See also id.* at 1182 ("the jurisdictional powers in § 1964(a) serve the goal of foreclosing future violations, and do not afford broader redress"). The court explained further that

the limiting language of § 1964(a) is unambiguous, and instructs that any equitable remedies be tailored to prevent and restrain future or ongoing RICO violations, not to punish past conduct. *See id.* at 1181-82.

Consequently, the Second Circuit held that disgorgement is not available to compensate persons allegedly wronged by civil RICO violators or to punish the violators for past conduct. *Id.* at 1182. The court explained further that disgorgement of ill-gotten gains earned in the past would not serve to prevent or restrain future RICO violations unless the gains were being used to fund or promote the illegal conduct or constituted capital available for that purpose. *Id.*

Applying the plain language of § 1964(a) and consistent with *Carson*, the Fifth Circuit in this case held that "Section 1964(a) establishes that equitable remedies are available only to prevent ongoing and future conduct," and here there is no ongoing or future conduct.[13] (Petition App. at 17.) In so ruling, the Fifth Circuit found that Petitioner "does not seek disgorgement to 'prevent and restrain' the [Respondents] from producing PB plumbing systems. In fact, . . . Richard concede[d] that the [Respondents] no longer market the plumbing systems." (*Id.*) As the Fifth Circuit explained, Petitioner's "disgorgement claim seems to do little more than compensate for the alleged loss," and thus fails to state a proper remedy under § 1964(a).[14] (*Id.*)

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13. Petitioner claims that the Fifth Circuit's interpretation of *Carson* "spells trouble for the Government's civil RICO litigation against the tobacco industry. . . ." (Petition at 22-23 n.17.) Petitioner's claim is unfounded. The D.C. district court found the Fifth Circuit's decision "distinguishable . . . on its facts," as, among other things, "[i]n *Richard*, the parties from whom disgorgement was sought were no longer operating the business in which they had committed the racketeering acts." *See United States v. Philip Morris USA, Inc.*, 321 F. Supp.2d 72, 80 n.9 (D.D.C. 2004).

14. Petitioner's argument that he should have been granted an (Cont'd)

B. Petitioner Lacks Standing To Plead Civil RICO Claims

The District Court also dismissed Petitioner's civil RICO claims for failure to plead proximate causation, which ruling the Fifth Circuit affirmed.[15] (Petition App. at 45.) In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), the leading case on this point, this Court held squarely that a plaintiff has standing to assert a RICO claim only if he can allege, unlike here, an injury "by reason of" (*i.e.*, directly caused by) a violation of the RICO Act. *Id.* at 270-74. *See also Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985) (ruling that a RICO "plaintiff only has standing . . . by [reason of] the conduct constituting the violation"). *Holmes* made clear that the "by reason of" language in RICO requires a causal connection between the predicate mail or wire fraud and plaintiff's injury that includes proximate causation. 503 U.S. at 265-68.

Following *Holmes*, the Fifth Circuit recently affirmed the dismissal of nearly identical RICO allegations, by a similarly situated plaintiff, in a polybutylene plumbing action against

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opportunity to amend his complaint to add disgorgement allegations should also be rejected. Such an amendment would be futile, as Petitioner cannot allege a cognizable disgorgement claim given that the allegedly wrongful conduct has ceased.

15. While the Fifth Circuit did not reach this issue, it is properly before the Court for consideration, as the parties fully briefed the issue in the lower courts (*see, e.g.*, R. 531-76, 973-1032). *Bennett v. Spear*, 520 U.S. 154, 166 (1997) ("a respondent is entitled . . . to defend the judgment on any ground supported by the record"). Similarly, the Court may consider the other independent grounds which were briefed in, but not decided by, the lower courts for dismissal of Petitioner's civil RICO claims, including failure to plead RICO with adequate particularity, failure to adequately plead that Respondents engaged in mail or wire fraud, failure to plead a RICO "enterprise," failure to plead a pattern of racketeering activity, failure to plead a RICO "investment injury," and failure to plead a RICO conspiracy. (R. 558-65.)

Respondents, and this Court denied the petition for certiorari. *See Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001). In so ruling, the Fifth Circuit found that where, as here, the alleged civil RICO claim was predicated solely on mail or wire fraud, the plaintiff must plead and prove detrimental reliance upon a representation made by the defendant in order to show proximate cause:

> Today we are invited to read RICO as establishing a federal products liability scheme complete with treble damages and attorney fees for the benefit of end-users of defective products who never relied on manufacturers' alleged misrepresentations of product quality. We are unpersuaded that RICO can be extended so far by such a marriage of distinct duties and liability regimes.

Id. at 557.

Petitioner here admits that he has not received, much less relied upon, any representation made by any of the Respondents. Thus, Petitioner plainly lacks standing to pursue a civil RICO claim against Respondents, and further review of this matter is not warranted.[16] *See id.* ("To hold otherwise would allow the threat of treble damages and attorneys fees to infiltrate garden variety products liability cases whenever marketing promotions

16. As this Court observed in *Holmes*, proximate cause cannot be properly pled where numerous intervening acts and decisions of third parties necessarily occurred between the alleged actions of Respondents and Petitioner's alleged injuries. 503 U.S. at 272-73. Here, there are numerous potential intervening causes between the alleged misrepresentations by Respondents to third parties and Petitioner's claimed injuries. As the Fifth Circuit ruled in *Summit* in rejecting nearly identical civil RICO claims against these same Respondents, "[a]s a product travels in the stream of commerce, inherent defects are carried with it, but fraudulent statements are not . . . The causal connection between a misrepresentation and a subsequent harm . . . vanishes once the product travels beyond the entity who actually relied on the representation. . . ." 214 F.3d at 560.

touted the merits of the products, even if no plaintiff relied on those representations").

C. Private Plaintiffs, Such As Petitioner, May Not Seek Equitable Relief Under Civil RICO

Assuming *arguendo* (and contrary to law and fact) that Petitioner had standing to plead a civil RICO claim and that a party may seek disgorgement for allegedly wrongful conduct that ceased long ago, Petitioner is not entitled to seek equitable relief under civil RICO. Indeed, other than the Seventh Circuit in *Nat'l Org. for Women, Inc. v. Scheidler,* 267 F.3d 687 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003), every court of appeal to have addressed the issue, in holdings or dicta, has found that private plaintiffs are not authorized to seek equitable relief under civil RICO.

For example, in *Religious Tech. Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), the Ninth Circuit expressly rejected the availability of injunctive relief to private plaintiffs under civil RICO.[17] *Id.* at 1084. In arriving at its conclusion, the *Wollersheim* court looked to the plain text of § 1964, noting that §§ 1964(a) and (b), the only portions of § 1964 that expressly grant equitable relief under the statute, refer solely to the federal courts and "the government." *Id.* at 1082. Section 1964(c), while expressly granting private plaintiffs authorization to pursue treble damages and attorneys' fees under the statute, provides "no express authority to *private plaintiffs* to seek [] equitable relief." *Id.* (emphasis in original). Reconciling the language of §§ 1964(a), (b), and (c), the court concluded:

> [T]he inclusion of a single statutory reference to private plaintiffs, and the identification of a damages

17. The Ninth Circuit recently affirmed its holding in *Wollersheim*. *See Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957, 967-68 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000) ("'Injunctive relief is not available to a private party in a civil RICO action'") (quoting *Wollersheim*).

> and fees remedy for such plaintiffs in part (c), logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs.

Id. at 1083 (emphasis in original).

While the Fifth Circuit declined expressly to reach this issue in this case (Petition App. at 16), the Fifth Circuit and, from Celanese's review, every other court of appeal to have commented on the issue has expressed "considerable doubt" that injunctive relief is available to private plaintiffs under RICO. *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 977 n.42 (5th Cir. 2000). *See also Switzer v. Coan*, 261 F.3d 985, 992 n.14 (10th Cir. 2001) (same); *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 726 (4th Cir. 1999) ("substantial doubt"); *Ganey v. Raffone*, 91 F.3d 143, 1996 WL 382278, *3 n.6 (6th Cir. July 5, 1996) (unpublished) ("questionable," and finding *Wollersheim* "persuasive"); *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990) (same); *In re Fredeman Litig.*, 843 F.2d 821, 830 (5th Cir. 1988) ("We find the analysis contained in the *Wollersheim* opinion persuasive. Congress indeed had several opportunities to give express authorization to private injunctive actions but chose not to do so, apparently because it hesitated in the face of the ramifications of that remedy"); *Trane Co. v. O'Connor Secs.*, 718 F.2d 26, 28 (2d Cir. 1983) (expressing "doubts as to the propriety of private party injunctive relief").

Moreover, even under *Scheidler*, Petitioner's disgorgement claim would fail because *Scheidler* does not hold, much less suggest, that a private plaintiff, such as Petitioner here, who lacks standing to assert a civil RICO claim for monetary damages may nonetheless bring a claim for equitable relief. *See id.* at 693-700. Indeed, as this Court ruled in that case, "the threshold question" was "whether plaintiffs have standing to bring their claim." *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249,

255 (1994). The Court ultimately held that the plaintiffs did not. 537 U.S. 393, 397 (2003).[18] The result should be the same here.

CONCLUSION

Following well-settled authority, the Fifth Circuit affirmed the dismissal of Petitioner's due process claim and civil RICO claims, and Petitioner offers nothing to justify this Court's review of the matter. For these reasons, Celanese submits that further review of this matter is not warranted, and respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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18. *See also Steamfitters Local 420 v. Philip Morris, Inc.*, 171 F.3d 912, 935 n.20 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000) (affirming dismissal of plaintiffs' claim for injunctive relief because, among other things, "the lack of proximate cause in this case, [and] the remoteness of plaintiffs' alleged injury from defendants' alleged wrongdoing. . . .").